

United States Circuit Court  
of Appeals

For the Ninth Circuit

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SMITH-POWERS LOGGING COMPANY,  
a corporation, and  
C. A. SMITH LUMBER & MANUFACTURING COMPANY, a corporation,  
Appellants,

vs.

E. W. BERNITT and VICTOR WITTICK,  
Appellees.

No.  
2591

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Petition for Rehearing

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Filed

JAN 2 - 1917

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Attorney for Appellants.



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I.

The appellants respectfully request a rehearing of the above cause for the following reasons:

The money decree herein was based upon two items:

1st. A one-half interest in the booms.

2nd. An accounting of the profits from the oper-

ation thereof. It is respectfully submitted that the first item is excessive because the court made no deduction or allowance by reason of the expense of changing the boom rendered necessary by the orders of the War Department.

It is further submitted that the amount allowed for profits is excessive because the court did not consider

1st. That the cost of catching and storing the logs was borne largely by the appellants;

2nd. The necessary repairs of the booms were borne by the appellants;

The booms came into possession of the appellant Smith-Powers Logging Company in July, 1907, and at that time a valuation was placed on them of \$2,000. The court below in its opinion says of this valuation:

“The estimate seems to have been fairly made, with a purpose of arriving at the true value, and not with any view that it should be self-serving in anticipation of the present controversy.”

Both this court and the court below find that the date of ouster was June, 1909. There was, therefore, an interval of two years between the date of the valuation and the date of the ouster.

During this interval and prior to the date of ouster, the War Department refused to permit the maintenance and operation of the booms in their then condition, and required appellants to split the booms and leave a portion of the channel of the river open and free to navigation. Of this the court below said:

“ This requirement imposed a large amount of expense for reconstruction. The plaintiffs were unable to meet the expense, and the booms with an open channel through them without reconstruction **would be rendered of much less value than in their original condition.**”

The cost of splitting the channel and meeting the War Department's requirements as a condition precedent to operating the booms, is fully set forth in the record, separate and apart from the expense of extensions and improvements, yet no allowance is made therefor. Obviously, a boom which the War Department would not permit to be maintained or operated was of little value to anyone. It was not for appellees or appellants to decide whether or not the change should be made. It was rendered imperative by the action of the Government. The change was completed before the appellees were ousted and at a time when the court finds they were

operating the boom, yet the court awards appellees half the **gross** income during that period. If the change had not been made there would have been no profits, for the boom could not have been operated. Nor was the change a betterment or improvement in any sense. The capacity of the boom was greatly lessened and after the change was made the boom was of less value than when it came into the hands of the Smith-Powers Logging Company. The record is replete with proof of these matters, the evidence being undisputed.

Disregarding, as the court says we must, the extensive improvements made by appellants, it seems manifestly inequitable to award appellees half the value of the boom as it was before the Government required it to be split, plus half the gross income, when the very income thus divided was made possible only through complying with the Government requirements.

Accepting the court's ruling that appellees were entitled to a half interest in the boom and that there was an agreement by which appellees were entitled to half the income, is it equitable to select one date as the date of ouster and then select a date two years earlier for fixing the value of the boom, without requiring appellees to comply with the very agreement which the court finds to be in existence,

by sharing a portion of the expense imposed by law and by such agreement, without which compliance the boom would have been valueless and could have earned nothing? No question of consent to or notice of making the change required by the War Department is involved, for the court finds appellees were in possession and were operating the boom during this period. The expense of making the change is clearly set forth in the record, as is the value of the boom had such change not been made, and we respectfully submit that this undisputed testimony has been wholly overlooked by the court.

## II.

The agreement, as claimed by appellees, required that the appellees bear all the cost of catching, storing and sorting the logs.

The undisputed evidence is that they only contributed a minor portion of this work.

The cost of repairing and maintaining the boom was a charge against the gross profits, and no allowance is made therefor in the accounting upon which the decree is based.

Unless the booms had been greatly enlarged they could not have handled the logs; the cost of enlargement was all borne by the appellants, and no credit



is allowed them therefor either by way of rental, interest or otherwise.

We therefore respectfully petition this Honorable Court for a rehearing on these matters, that we may more fully present the same.

Respectfully submitted,

JOHN D. GOSS,

Attorney for Appellants.

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STATE OF OREGON, }  
COUNTY OF COOS. } ss.

I, John D. Goss, attorney for appellants in the above entitled suit do hereby certify that, in my judgment, the foregoing petition for rehearing is well founded, and that the same is not interposed for delay.

JOHN D. GOSS,

Attorney for Appellants. 2